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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1110

CLOVER COMPANY, INCORPORATED,
JOHN G. O'MARA,
THOMAS W. BURKS, - - - - Petitioners,

versus

GENERAL AGENCY, INC.,
STUYVESANT INSURANCE CO., - Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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TABLE OF CONTENTS.

	PAGE
Statement of the Case	1–7
1. Proceedings Below	2–4
2. The Facts	4–7
Reasons for Denying the Writ	8
I. General Grounds for Refusal	8
II. In Holding That the Respondents, Who are Separate and Unrelated Parties, by Their Amended Complaint, Established the Court's Jurisdictional Minimum Amount in Controversy Under Title 28, U.S.C.A., Section 1132(a), the United States Court of Appeals Rendered a Decision in Conflict With the Decisions of Other Court of Appeals and Prior Decision of the Supreme Court of the United States on the Question of Federal Court Jurisdiction	9–11
III. This Court Should Grant Certiorari to Consider whether the Supreme Court's Decision in *Erie R. R.* v. *Tompkins,* Should Not be Overthrown as by the Holding of the Court Below in This Action or Again Reaffirmed	12
IV. This Court Should Grant Certiorari to Settle the Question of Whether the Denial of a Jury Trial to Petitioners When Respondents Admit the Truth of Part of Petitioners' Allegations Against Respondents is in Fact a Denial Which Constitutes a Violation of Due Process of Law as to Petitioners as Guaranteed to Them by the Fifth Amendment of the United States Constitution	13
Conclusion	13–14

Citations.

	PAGE
Broderick v. Travelers, 175 F. 2d 694 (1949)	12
Erie R. R. v. Tompkins, 304 U. S. 64	12
New York Casualty Co. v. Williams and Henning, Ky., 187 S. W. 2d 801	12
Nickelson v. Nestles Mills Products Corporation, Inc., 107 F. 2d 17 (1939)	10

Statutes.

28 U.S.C. 2101	8
28 U.S.C. 2106	8

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Respondents respectfully submit that the petition for writ of certiorari should be denied for the reasons set forth below.

STATEMENT OF THE CASE.

Respondents, General Agency, Inc., of Pennsylvania, and The Stuyvesant Insurance Company, feel that a more complete Statement of the Case is required than that provided by Petitioners and set it forth below.

(1) PROCEEDINGS BELOW.

On April 13, 1966, a Complaint was filed in the name of General Agency, Inc., of Pennsylvania against the Clover Company, Inc., and John G. O'Mara and Thomas W. Burks (10b). That Complaint alleged that an Agency Agreement (4b) was entered into on or about December 9, 1963, between the plaintiff, General Agency, and defendant, Clover Company, Inc., and that that Agreement remained in effect until terminated as of December 22, 1964. Burks and O'Mara were sued as guarantors. The Complaint alleged that the defendants owed plaintiff or The Stuyvesant Insurance Compay the sum of $10,423.82 for accounts collected by Clover Company (2b). The Complaint also alleged that Clover Company had been given credit on its account with plaintiff in the sum of $4,797.48 so that the Clover Company could make some refunds on premiums collected in Tennessee but that Clover Company had refused to make said refunds and therefore owed plaintiff that additional sum of $4,797.48, plus interest thereon of $299.59 (2b). The entire claim asserted was $15,520.89 (3b).

Clover Company filed its Answer and Cross-Complaint (12a-14a), in which it admitted that it was to act as agent for General Agency and/or The Stuyvesant Insurance Company and admitted the Agency Agreement.

The defendants Burks and O'Mara filed their Answer separately (15b). They admit therein the execution of the Agency Agreement and Guaranty Agree-

ment and plead in general that the accounts between General Agency and Clover Company hadn't been finalized and therefore deny any obligation on their guaranty.

Interrogatories were answered by the plaintiff, General Agency in August, 1966 (14a-15a).

On September 7, 1967, defendants filed their Motion to Dismiss, claiming the amount in controversy was less than $10,000.00, at the time the Complaint was filed (18b).

On September 19, 1967, plaintiff, General Agency, filed its Response to the Motion to Dismiss (19b).

The District Court overruled the Motion to Dismiss on October 6, 1967. Its Order (22b) specifically held that the jurisdictional amount had been established.

On October 17, 1967, the District Court sustained the Motion to file the Amended Complaint (16a-18a). That Amended Complaint adds The Stuyvesant Insurance Company as a party plaintiff. It pleads that the defendants owed the plaintiffs as of the filing of the original Complaint $10,178.67 (16a), and it repeats that the defendants had been given credit for the sum of $4,797.48 to make premium refunds in Tennessee which had not been made by Clover Company and that subsequent to the filing of the original Complaint a judgment had been rendered against Stuyvesant for the premium refunds, interest thereon, and court costs, in the sum of $5,129.82, and that that sum was added to the Account Current with Clover Company as of September, 1966 (17a). The Amended Complaint also pleads that additional premium refunds were made by

plaintiffs which made the total sum due plaintiffs $15,009.66 (18a).

On November 20, 1967, the depositions of the defendants, Burks and O'Mara, and the deposition of the General Manager of Clover Company, B. A. Sant, were taken (28b-37b).

On March 8, 1968, plaintiffs filed their Motion for Summary Judgment (25b), with the Affidavit of D. R. Klock (19a).

On March 18, 1968, defendants filed the Counter-Motion for Summary Judgment (25b).

On August 30, 1968, the District Court heard oral argument on the Motions for Summary Judgment and ruled that plaintiffs' Motion would be sustained (27b), and the appropriate Judgment was then tendered and entered (27a), after defendants had filed their objections thereto (22a).

Respondents then appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court by per curiam order entered October 16, 1969.

THE FACTS.

On or about December 9, 1963, an Agency Agreement (4b) was entered into between General Agency, Inc., and the Clover Company. In that agreement the Clover Company as "agent" was set up as a general insurance agent to write automobile physical damage insurance coverage. Clover Company under paragraph 3 was to be paid commissions on net premiums

"arising out of policies actually secured" by it as agent. Under paragraph 5 Clover Company was the trustee for General Agency and Stuyvesant on all premiums received by it. It is clear in paragraph 5 that Clover Company was trustee for and accountable to both General Agency and The Stuyvesant Insurance Company.

On or about January 3, 1964, the defendants, Burks and O'Mara executed a Guaranty Agreement (9a-11a) in which they jointly and severally and unconditionally guaranteed the account of Clover Company with General Agency. This Guaranty Agreement covers any and all forms of indebtedness of Clover Company to General Agency. This Guaranty Agreement covers all debts arising out of the Agency Agreement and is quite comprehensive.

Policies were sold and premiums collected and paid in part to General Agency and Stuyvesant. Part of the policies were sold by Clover Company through a sub-agent in Tennessee. The relationship was properly terminated effective December 22, 1964, at which time Clover Company owed plaintiffs a substantial sum of money plus a credit Clover Company had been given on its account to use to refund certain premiums in Tennessee.

This was still the situation in April, 1966, when this suit was filed, except by that time The Stuyvesant Insurance Company and Southern Agency Service Company (the name under which Clover Company, Inc., did business), had been sued in Tennessee by the sub-agent for the premium refunds which the sub-agent

had made when the money was not forthcoming from Clover Company.

After this suit was filed, the sub-agent in Tennessee obtained a judgment against Stuyvesant Insurance Company and Southern Agency (17a) and Stuyvesant satisfied that judgment and then added that sum back to the Account Current of Clover Company since the credit previously given had not been used to make such payments. This then made the total due plaintiffs on the Account Current of Clover Company the sum of $15,009.66, the amount of the Judgment entered herein (27a).

During the deposition of the defendant, Burks (pages 11 through 13, 30b-32b), Secretary-Treasurer of Clover Company, Inc., Mr. Burks agreed to advise if the defendants disputed any part of the $15,009.66 claim set forth in the Amended Complaint. He never subsequently advised of any dispute with that figure and it was admitted to the District Court that that figure was accurate when the Summary Judgment motions were argued.

The only question or claim raised involved the counter-signature commission claim as a set-off. In fact, this is the formal treatment of that claim in Clover Company's Counter Motion for Summary Judgment (25b).

The General Manager of Clover Company testified at pages 58-59 of his deposition (36b-37b) that he was requested to countersign policies by The Stuyvesant Insurance Company but that there was no discussion of countersignature commissions. Mr. Burks testified

that he had no contact with anyone directly about the subject (30b), and Mr. O'Mara testified in like fashion (34b). There was, therefore, no claim of any oral or written agreement outside the Agency Agreement covering the subject.

The Agency Agreement (4b), authorizes Clover Company to countersign policies but has no specific provision for payment of fees for so doing. The subject is simply not covered.

The defendants persisted in asserting a claim for countersignature commissions and demanding to know the amount of commissions paid and premiums paid on the policies which they had countersigned. For that reason the Affidavit of D. R. Klock, Assistant Secretary of The Stuyvesant Insurance Company, was filed (19a). He states in his Affidavit that commissions were paid on policies countersigned by Clover Company on policies which earned premiums totalling $216.00. All policies countersigned by Clover Company earned prtmiums totaling $46,441.82, but commissions were not paid on the balance.

The District Court held that there was no agreement to pay countersignature commissions and since, with the minor exception noted, no commissions were paid on such policies, therefore Clover Company and the other defendants were not entitled to a set-off for countersignature commissions under the undisputed facts and the appropriate law.

REASONS FOR DENYING THE WRIT.

Respondents, for purposes of clarity, have used Petitioners' Questions Presented as the headings for Sections II, III and IV of their argument. Section I is devoted to general grounds for refusal of the Petition for Certiorari.

I. General Grounds for Refusal of the Petition for Certiorari.

First, Respondents submit that Petitioners have failed to meet jurisdictional requirements since they failed to file their Petition within ninety days from the October 16, 1969, decision and order of the Sixth Circuit Court of Appeals. The Petition was not filed until January 23, 1970, and the last day for filing was January 14, 1970. Since 28 U.S.C. 2101 has not been complied with, the Petition should be denied.

Secondly, Petitioners have not properly invoked jurisdiction of the Supreme Court, since 28 U.S.C. 2106, is not a statute which is jurisdictional.

Thirdly, Petitioners have failed to comply with Rule 40 (c) of the Rules of the Supreme Court of the United States since they have failed to set forth the constitutional provisions and statutes which Petitioners claim the case involves.

II. In Holding That the Respondents, Who Are Separate and Unrelated Parties, by Their Amended Complaint, Established the Court's Jurisdictional Minimum Amount in Controversy Under Title 28, U.S.C.A., Section 1132(a), the United States Court of Appeals Rendered a Decision in Conflict With the Decisions of Other Courts of Appeals and Prior Decisions of the Supreme Court of the United States on the Question of Federal Court Jurisdiction.

The jurisdictional question raised by appellants should be viewed first from the standpoint of the original Complaint filed. That Complaint in paragraph 5 (2b), alleges that Clover Company, Inc. owed $10,423.82 for accounts collected by Clover Company, Inc., under its contract with General Agency. The Complaint goes on to allege in paragraphs 6 and 7 (2b-3b), that Clover Company, Inc., had been credited with $4,797.48 on its account since certain refunds were due policyholders in Tennessee. The $4,797.48 credit to Clover Company's account was to enable Clover Company to make the refunds but it failed to do so. General Agency then in the original Complaint seeks the balance due of $10,423.82 plus the $4,797.48 plus the interest due thereon of $299.50, or a total of $15,520.89 (3b). This clearly exceeded jurisdictional minimums.

Defendants served the plaintiff, General Agency, with Interrogatories which sought an up-to-date statement of defendants' account with General Agency. This was given in response to Interrogatory 26. The Answer to that Interrogatory shows that through June, 1966, as a result of certain credits, the claim was

$9,925.83, plus the outstanding question concerning certain credits for refunds in Tennessee. However, the important point was that this Answer to Interrogatory showed that plaintiff's claim in April, 1966 when the Complaint was filed was $10,009.09, plus the outstanding question concerning the credits for refunds in Tennessee (14a-15a).

It was on the above basis that the District Court on October 6, 1967 overruled defendants' Motion to Dismiss for Lack of Jurisdiction (22b), finding that the record supported the fact that the amount in controversy was in excess of the required jurisdictional amount (22b). The District Court quite properly held that once jurisdiction was acquired it could not subsequently be defeated, citing *Nickelson* v. *Nestles Mills Products Corporation, Inc.,* 107 F. 2d 17 (5th Cir., 1939).

Thereafter on October 17, 1967, the District Court sustained the Motion to file the Amended Complaint (2a).

The Amended Complaint included The Stuyvesant Insurance Company as a plaintiff (16a). One need merely read the Agency Agreement (Exhibit A to the Complaint, 4b), to realize that General Agency was acting as the agent for Stuyvesant Insurance Company and that the defendant, Clover Company, in collecting premiums was the trustee for both General Agency and Stuyvesant. Specifically, paragraph 5 (9b-10b), provides "All premiums so received by Agent shall be held in a fiduciary capacity as trustee for the Manager and

Company." That paragraph goes on to provide that Stuyvesant would furnish an "Account Current" of funds due General Agency by Clover Company and that the balance shown thereon would be due General Agency within a designated period.

It is, therefore, clear that General Agency was merely a conduit for the collection of funds for Stuyvesant Insurance Company and for that reason and the fact that Stuyvesant paid the refund premiums due in Tennessee, the Amended Complaint was filed. A summary of the "Account Current" between plaintiffs and Clover Company was attached to the Amended Complaint showing the total due plaintiffs (24b). It was and is quite clear from the record that there is one claim which both General Agency and Stuyvesant Insurance Company were entitled to and did assert in the Amended Complaint and that claim was well above the jurisdictional requirement.

It can be seen that the District Court and the Sixth Circuit Court of Appeals applied basic law to this question. Jurisdictional amount was originally alleged and established. There were not separate claims by separate entities, but a single total claim of $15,520.89, properly assertable by both plaintiffs. There simply was no basis for the jurisdictional issue raised by Petitioners and the District Court so found, and the Sixth Circuit properly affirmed.

III. This Court Should Grant Certiorari to Consider Whether the Supreme Court's Decision in Erie R. R. v. Tompkins, Should Not be Overthrown as by the Holding of the Court Below in This Action or Again Reaffirmed.

Petitioners claim that the lower courts failed to follow decisions of the Kentucky Court of Appeals. However, Petitioners fail to cite any such cases. The reason is evident. There are no such cases. There was a case available which was directly in point. It was the decision of the Ninth Circuit Court of Appeals of *Broderick* v. *Travelers,* 175 F. 2d (1949). In addition, the Kentucky Court of Appeals in *New York Casualty Co.* v. *Williams and Henning,* Ky., 187 S. W. 2d 801, at page 804 specifically holds that "There is no statute in this State regulating the amount of agents' commission, and the Director of Insurance has not been delegated authority to regulate them."

The lower courts properly applied Kentucky law to the extent it was available and equally properly relief upon authority from other jurisdictions where Kentucky law was not available. This in no way does violence to *Erie R. R.* v. *Tompkins,* 304 U. S. 64.

IV. This Court Should Grant Certiorari to Settle the Question of Whether the Denial of a Jury Trial to Petitioners When Respondents Admit the Truth of Part of Petitioners' Allegations Against Respondents is in Fact a Denial Which Constitutes a Violation of Due Process of Law as to Petitioners as Guaranteed to Them by the Fifth Amendment of the United States Constitution.

Petitioners are apparently claiming that Summary Judgments can never be granted because they in some way deny due process. The very processes of law were carefully followed by the courts. Petitioners are arguing that the Federal Rules of Civil Procedure are unconstitutional. There is no basis for this argument and it certainly was never raised in the District Court or the Sixth Circuit.

Under one theory Petitioners may have been entitled to a credit of $27.00 on the judgment entered but they consistently refused to accept that credit. Petitioners took an all or nothing position in the courts below and they lost. This hardly created an issue of fact to be tried, particularly when viewed in light of Petitioners' own motion for summary judgment which admitted that there was no dispute of fact (25b).

CONCLUSION.

Petitioners filed their Petition too late and it should be refused on that ground.

Petitioners in any event have failed to establish any accepted ground for granting a Petition for Certiorari. No constitutional issue has been raised. No

federal statute is involved. The Supreme Court has many important cases to consider without wasting its time on a case such as this.

It is respectfully submitted that the Petition for Certiorari should be denied.

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